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ETIQA GENERAL TAKAFUL BHD v. MOHD KHAIRUL IRMAN MOHD ZIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[ORIGINATING SUMMONS NO: WA-24NCC-611-11-2023]
20 DECEMBER 2024

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Abstract – *(i) If the certificate of takaful or schedule had clearly stated the issuance time of an insurance policy, such time would be the commencement time of the said policy; (ii) The duty of utmost good faith in respect of an insurance contract is applicable to both parties. The insured must also disclose any material fact to the insurer before an insurance contract is entered; (iii) The interest of third parties will not override the clear language and effect of an insurance contract. Although the Road Transport Act 1987 does have a salutary aim of facilitating recovery of accident claims, insurers should not be compelled to underwrite any risk it did not agree to bear.*

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ROAD TRAFFIC: *Insurance – Third party claims – Road traffic accident between motorcar and motorcycle – Rider of motorcycle filed civil action against owner and driver of motorcar – Application via originating summons ('OS') by insurer of motorcar under s. 96(3) of Road Transport Act 1987 ('RTA') to void insurance policy ('policy') covering motorcar – Whether OS could be properly decided solely based on affidavit evidence – Policy issued on same date of accident – Whether policy in effect at time of accident – Whether insurer waived right to void policy – Whether voiding of policy would run contrary to underlying objectives of RTA*

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On 23 December 2022, a road traffic accident involving a motorcar and a motorcycle occurred ('accident'). The motorcar was owned by the first defendant, and it was driven by the second defendant at the time of the accident. The third defendant was the rider of the motorcycle. The plaintiff was the insurer of the motorcar. On the same day of the accident, at 3.49pm, the plaintiff issued an insurance policy for the motorcar ('policy'). According to the police reports made by the defendants, the accident was said to have occurred at 3.45pm or 2.47pm. Whereas according to the photographs of the motorcycle after the accident, and of the injuries suffered by the third defendant pursuant to the accident, respectively, they showed the timestamps of 2.45pm and 3.32pm. These timestamps showed that the issuance of the policy was made after the occurrence of the accident. Subsequently, the third defendant filed a civil action against the first and second defendants. That prompted the plaintiff, by relying on s. 96(3) of the Road Transport Act 1987 ('RTA'), to file an originating summons ('OS') in this court, seeking for declarations that, among others: (i) the policy was void and unenforceable in

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relation to the accident; and (ii) the plaintiff was not liable to bear any claims arising from the accident. In contesting the OS, the third defendant contended that: (i) where no specific time was stated in the certificate of takaful or schedule ('certificate') for the commencement of coverage, the policy would take effect from the midnight of the start date (in this case 23 December 2022) regardless of what time it was purchased; (ii) under the Financial Services Act 2013 ('FSA'), the burden was on the insurer to make the proper inquiries when issuing a policy. Since the plaintiff had failed to inquire about the accident, the plaintiff had waived its right to void the policy; (iii) the present case involved disputed facts which could not be resolved through affidavit evidence in an OS proceedings; and (iv) the voiding of policy would prejudice an innocent third party, contrary to the social protection aims of the RTA. The issues that arose in the OS were: (i) whether the OS could be properly decided solely based on affidavit evidence; (ii) whether the policy was in effect at the time of the accident; (iii) whether the plaintiff had waived its right to void the policy; (iv) whether the granting of the declarations would be contrary to the intention of the RTA; (v) whether the plaintiff's own omissions or carelessness ought to prevent it from obtaining the declarations; and (vi) whether, in the present circumstances, s. 96(3) of the RTA ought to be interpreted so as to allow the OS.

Held (allowing OS with costs):

(1) Unlike *Balamoney Asoriah v. MMIP Services Sdn Bhd* ('*Balamoney*') and *Aqmal Dakhirrudin v. Azhar Ahmad & Malaysian Motor Insurance Pool* ('*Aqmal*'), where oral evidence was needed to resolve factual controversies about the parties' conduct, the present case had contemporaneous documentary evidence which established the critical timeline. The first and second defendants' testimonies could not alter the objective facts about timing. In *Balamoney*, the policy's validity turned on the insurer's own conduct in renewing it after the insured's death. Whereas in the present case, the simple chronological sequence showed that the policy was purchased after the occurrence of the accident. This was not a matter requiring extensive factual inquiry – it was apparent from the documents themselves. Therefore, while the principles in *Balamoney* and *Aqmal* were fully accepted in that disputed facts generally require oral evidence, the present case was exceptional. The documentary evidence had conclusively established the sequence of events, making the present case suitable for determination by OS. A full trial would be an unnecessary formality as the essential facts were already irrefutably proven by contemporaneous records. (paras 22-24)

(2) Following the Federal Court's decision in *Pacific & Orient Insurance Co Bhd v. Hameed Jagubar Syed Ahmad* ('*Pacific & Orient*'), the specification of both date and time in the certificate had created a 'special contract' where coverage commenced at that precise time. Since all available

evidence placed the accident before 3.49pm, it necessarily occurred outside the period of coverage. This conclusion aligned with both legal principle and commercial reality. As emphasised in *Pacific & Orient*, insurance is fundamentally a contract of speculation regarding future uncertainties. It would be commercially nonsensical and legally problematic, to interpret an insurance contract as covering an accident that had already occurred before the contract's formation. The evidence of photography timestamps and police reports showing the accident's earlier occurrence served to reinforce this legal analysis, though it was not strictly necessary to the outcome. The specification of 3.49pm as the issuance time, pursuant to *Pacific & Orient*, was itself sufficient to establish the said time as the commencement of coverage. It was hence held that the policy took effect at 3.49pm on 23 December 2022, after the accident had already occurred. (paras 36-39)

(3) The relevant provisions under the FSA does not impose a strict liability on the insurer for failing to ask specific questions. While sch. 9 does spell out situations where the insured's duty of disclosure may be waived under paras. 5(5) and (6), these provisions must be read purposively and in context. There was no evidence that the plaintiff was put on inquiry that an accident had already occurred on that date. Without any basis for suspicion, it was unreasonable to expect the plaintiff to routinely ask every proposer about same-day accidents before issuing a policy. The plaintiff was entitled to rely on the first defendant's implied representation that the motorcar was not tainted by any prior mishaps. This interpretation was supported by *Balamoney* and *Mohd Faiz Zulkifli v. Etiqa Takaful Bhd* ('*Mohd Faiz*'). In *Balamoney*, it was held that 'the new statutory regime recognises in sub-para. 5(9) the mutual duty of utmost good faith or *uberrimae fidei* that was owed at all times by both parties to the insurance contract'. It would be contrary to this principle, public policy and common sense to allow an insured to suppress material facts and profit from such non-disclosure, in the hope that the insurer's lack of clairvoyance or targeted probing would be construed as a waiver. The reciprocal duty of utmost good faith and the spirit of the FSA militated against such an interpretation. Whereas in *Mohd Faiz*, it was held that the non-disclosure of a prior accident would amount to fraud sufficient to avoid the policy, if the insured person failed to disclose the true facts when specifically asked. Considering that there was no reasonable opportunity for the plaintiff to discover the accident through a routine inquiry, the first defendant's failure to disclose such a material fact struck at the root of the insurance contract and could not be excused by the insurer's failure to specifically ask about it. The plaintiff therefore had not waived its entitlement to avoid the policy for pre-contractual non-disclosure, and its omission to ask about a pre-existing accident did not preclude the present OS to void the policy under s. 96(3) of the RTA. (paras 46-51)

(4) The interest of third parties could not override the clear language and effect of the contract between the plaintiff and the first defendant. While the RTA does have a salutary aim of facilitating the recovery of accident claims, it does not compel an insurer to underwrite a risk that it did not agree to bear. It was significant that the plaintiff was seeking the declarations under s. 96(3) of the RTA, which specifically empowered an insurer to obtain such court order to invalidate a policy, before any judgment on liability was entered. The existence of this provision demonstrated that Parliament did envision situations where an insurer's contractual rights would take precedence over a third-party claimant. Regardless, voiding this policy would not leave the third defendant without any remedy, as he would still have an avenue to pursue his claim directly against the first and second defendants as the culpable tortfeasor(s). The third defendant's rights against the plaintiff could not rise higher than that of the first defendant as the plaintiff's contractual counterparty. Since the policy itself was void due to the first defendant's non-disclosure, the third defendant also could not claim the benefit of the vitiated policy. As such, the granting of the plaintiff's OS would not run counter to the underlying objectives of the RTA. (paras 53-56)

(5) The plaintiff was not under any obligation to play detective and press the first defendant for details of an accident it was unaware of. There was nothing to suggest that the plaintiff was careless in processing the policy. The law does not require an insurer to be a mind reader and expect the worst of each proposer. The first defendant, as the party seeking coverage, had the responsibility of making a clean breast of all material facts within his knowledge. He could not blame the plaintiff for taking him at his word and issuing the policy without deeper investigations. There was no remissness or lack of due care on the plaintiff's part that would disentitle it from the declaratory relief. (paras 58-60)

(6) The reasoning in *Kurnia Insurans (Malaysia) Bhd v. Personal Representatives Of Zenol Saad & Ors* ('*Kurnia*') demonstrated that s. 96(3) of the RTA serves a crucial mechanism for insurers to challenge policy validity before they become statutorily bound to satisfy any judgment under s. 96(1). Section 96(1) imposes a broad obligation on insurers to honour judgments against their insured parties 'notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy'. However, s. 96(3) carves out an important exception – allowing insurers to obtain declarations voiding policies before judgment is entered, thereby pre-empting the s. 96(1) obligation. The High Court in *Kurnia* had proceeded to grant the declarations sought despite the pending Sessions Court trial, recognising that s. 96(3) applications need not await the outcome of the main liability proceedings. This supported the plaintiff's right to bring the present OS

A at this juncture. Moreover, this interpretation aligned with the statutory scheme's balance between protecting third party claimants and preserving insurer's rights to challenge policy validity on legitimate grounds. While s. 96(1) ensures claimants can recover from insurers once judgment is obtained, s. 96(3) provides insurers a window to
B contest clearly void policies before that liability crystallises. Therefore, the court was satisfied that s. 96(3) permits the plaintiff to seek the declarations at this stage, prior to any judgment being entered in the Sessions Court proceedings. The potential impact on the injured claimant's prospects of recovery, while unfortunate, could not override
C the clear statutory right granted to insurers under s. 96(3) when properly invoked within the prescribed time frame. (paras 64-67)

(7) The OS was allowed, and the following orders were granted: (i) the policy was void and unenforceable in respect of the accident; (ii) the plaintiff shall not be liable for any claims arising from the accident; and
D (iii) the third respondent shall pay costs of RM20,000 to the plaintiff. (para 68)

Case(s) referred to:

Allianz General Insurance Company (M) Bhd v. Malim Shahrizal Abdul Wahab & Anor [2021] CLJU 1544; [2021] 1 LNS 1544 HC ***(refd)***

E *Aqmal Dakhirrudin v. Azhar Ahmad & Anor [2019] CLJU 492; [2019] 1 LNS 492 CA* ***(dist)***

Balamoney Asoriah v. MMIP Services Sdn Bhd [2020] 1 CLJ 476 CA ***(dist)***

Hameed Jagubar Syed Ahmad v. Pacific & Orient Insurance Co Bhd [2017] 10 CLJ 278 CA ***(refd)***

Kurnia Insurans (Malaysia) Bhd v. Personal Representatives Of Zenol Saad & Ors [2013]
F *CLJU 239; [2013] 1 LNS 239 HC* ***(refd)***

Liberty Insurance Bhd v. Muhammad Qairul Jafnie Abdul Rani & Anor [2024] CLJU 453; [2024] 1 LNS 453 HC ***(refd)***

Mohd Faiz Zulkifli (A Minor Suing Through His Father And Next Of Kin; Zulkifli Awang Kechik) & Anor v. Etiqa Takaful Bhd [2016] 5 CLJ 679 HC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Hameed Jagubar Syed Ahmad [2018] 9 CLJ 691
G *FC* ***(refd)***

Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC ***(refd)***

Legislation referred to:

Road Transport Act 1987, s. 96(1), (3)

H *For the plaintiff - Sean Denis; M/s Jayadeep Hari & Jamil*
For the 3rd defendant - S Ganesh M Subramaniam; M/s Abdul Rahim & Co

Reported by Syamim Ariffin

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JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] Before the court is an application by an insurance company under s. 96(3) of the Road Transport Act 1987 for declarations that a motor insurance policy is void and unenforceable in relation to a road accident, and that the insurer bears no liability for claims arising from that accident. The core issue is whether the policy, which was purchased on the same day as the accident, had come into effect at the time the accident occurred, with the evidence suggesting the policy was issued at 3.49pm while the accident took place earlier that afternoon. Central to the court's determination are questions about when insurance coverage commences when both issuance and accident occur on the same day, whether the insurer waived its rights by not making specific inquiries before issuing the policy, and whether voiding the policy would undermine the protective purpose of the Road Transport Act 1987.

Background Facts

[2] On 23 December 2022, a road traffic accident occurred involving a motor car bearing registration number WXE 6746 and a motorcycle bearing registration number BQU 1570. The motor car was owned by the first defendant, Mohd Khairul Irman bin Mohd Zin, and was being driven by the second defendant, Nurul Azera binti Ahmad, at the material time. The motorcycle was being ridden by the third defendant, Mohamad Afiq bin Ahmad.

[3] On the same day, 23 December 2022, the first defendant obtained an insurance policy (Policy No. 85606544) from the plaintiff, Etiqa General Takaful Berhad ('Etiqa') for the motor car WXE 6746. The Certificate of Takaful and Schedule indicated the period of coverage as being from 23 December 2022 to 22 December 2023. The policy was issued at 3.49pm on 23 December 2022.

[4] On 27 December 2022 at 12.52pm, the third defendant made a police report (Report No. Shah Alam/035235/22) stating that the accident had occurred on 23 December 2022 at approximately 3.45pm.

[5] Later on the same day, 27 December 2022, at 5.32pm, the second defendant made her first police report (Report No. Shah Alam/035267/22) also stating that the accident had occurred on 23 December 2022 at approximately 3.45pm.

[6] Subsequently, on 27 December 2022 at 6.11pm, the second defendant made a correction police report (Report No. Shah Alam/035269/22) amending the time of the accident to 2.47pm on 23 December 2022.

[7] Etiqa appointed an adjuster to investigate the circumstances of the accident. During the investigation, the adjuster obtained photographs from both the second and third defendants. Two photographs of motorcycle BQU 1570 shared *via* WhatsApp by the second defendant showed a timestamp of 2.45pm on 23 December 2022. Additionally, two photographs showing the third defendant's injuries, shared *via* WhatsApp by the third defendant, displayed a timestamp of 3.32pm on 23 December 2022.

[8] Subsequently, the third defendant filed a civil action against the first and second defendants under suit number BA-A73KJ-672-07-2023.

[9] Etiqa then filed an originating summons seeking declarations that Policy No. 85606544 was void and unenforceable in relation to the accident that occurred on 23 December 2022, and that Etiqa was not liable to satisfy any claims arising from the accident.

[10] These proceedings were heard before the High Court, with Mr Sean Denis appearing for Etiqa and Mr S Ganesh appearing for the third defendant. The first and second defendants did not appear at the hearing despite being served with notice.

The Plaintiff's Application

[11] Etiqa filed an originating summons seeking the following declarations: (i) an extension of time (if necessary) to file the originating summons; (ii) that Policy No. 85606544 covering motor car WXE 6746 for the period 23 December 2022 to 22 December 2023 was void and unenforceable in relation to the accident that occurred on 23 December 2022 involving motor car WXE 6746 and motorcycle BQU 1570; (iii) that Etiqa was not liable to bear any claims arising from the said accident; (iv) any further orders or directions deemed appropriate by the court; and (v) costs.

[12] The application was grounded on the contention that the insurance policy was purchased after the accident had already occurred. Etiqa argued that the policy was issued at 3.49pm on 23 December 2022, whereas according to the police reports and photographic evidence, the accident had occurred earlier that day – either at 2.47pm according to the second defendant's correction report, or at 3.45pm according to the original reports. Etiqa contended that the first defendant had failed to disclose the accident when purchasing the policy, which amounted to non-disclosure of material facts and/or misrepresentation that vitiated the insurance contract. The application was made pursuant to s. 96(3) of the Road Transport Act 1987 ('RTA 1987'), which allows insurers to obtain declarations voiding insurance policies before any judgment is obtained against the insured.

Parties' Submissions

[13] The plaintiff submitted that the insurance policy only took effect from the specific time it was issued at 3.49pm on 23 December 2022, and therefore, did not cover the accident which occurred earlier that day. The

plaintiff argued that the principle of utmost good faith required the first defendant to disclose the accident when purchasing the policy, and his failure to do so rendered the policy void. The plaintiff contended that the timestamp on the issuance document created a "special contract" determining when coverage began, and that no insurance company would knowingly provide coverage for an accident that had already occurred. The plaintiff also emphasised that under the Financial Services Act 2013 ('FSA'), insurers cannot assume risk until premium is paid.

[14] The third defendant submitted that where no specific time is stated in the Certificate of Takaful or Schedule for commencement of coverage, the policy takes effect from midnight of the start date (23 December 2022) regardless of what time it was purchased. He argued that both the Certificate of Takaful and Schedule only specified dates without times, stating the period as "23 December 2022 to 22 December 2023". The third defendant further contended that under the FSA, the burden was on the insurer to make proper enquiries when issuing a policy, and the plaintiff's failure to do so amounted to a waiver of its right to void the policy. He also argued that there were disputed facts which could not be properly resolved through affidavit evidence in originating summons proceedings, and that voiding the policy would prejudice an innocent third party contrary to the social protection aims of the RTA 1987.

Analysis And Findings Of The Court

Whether The Application Can Be Properly Decided Based Solely On Affidavit Evidence

[15] Mr Ganesh submitted that the originating summons should be dismissed as the insurance contract was never exhibited, and there are disputed facts which cannot be resolved *via* affidavit evidence alone without oral testimony and cross-examination.

[16] He relied heavily on *Balamoney Asoriah v. MMIP Services Sdn Bhd* [2020] 1 CLJ 476, where Mary Lim JCA (as she then was) held that "given the nature of the issue, its determination by way of an exchange of affidavits and with the critical parties not before the court was not appropriate." Her Ladyship emphasised that "the circumstances and conditions surrounding the renewal are clearly beyond the capacity and remit of the appellant to address, let alone answer. Hence, such applications ought not to be dealt with in the manner done, especially where the relevant and necessary parties are not before the court."

[17] Mr Ganesh also cited *Aqmal Dakhirrudin v. Azhar Ahmad & Anor* [2019] CLJU 492; [2019] 1 LNS 492, where the Court of Appeal adopted the Supreme Court's position in *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331; [1992] 2 MLJ 212 that

A "the conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidence which, however, was not possible in proceedings begun by originating summons. In any case, it was most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence."

B **[18]** In response, learned counsel for Etiqa, Mr Sean Denis, submitted that the material before the court is sufficient to decide the originating summons. He pointed to the Certificate of Takaful and Schedule (exh. CSY1) which are the operative documents evidencing the coverage period.

C **[19]** While I acknowledge the force of the principles in *Balamoney Asoriah* and *Aqmal Dakhirrudin*, I find those cases distinguishable on their facts. In *Balamoney*, the core issue was whether there was misrepresentation in the renewal of the policy after the insured's death – a matter that clearly required input from the parties involved in that renewal. As Mary Lim JCA noted, this involved "questions of mixed fact and law" concerning "the
D circumstances as to how or when the insurance policy was actually renewed."

[20] Similarly, in *Aqmal Dakhirrudin*, the dispute centred on an alleged transfer of interest in the insured vehicle, which the Court of Appeal held
E "could only be properly and satisfactorily resolved if oral evidence was adduced." The court emphasised that where "the facts are disputed and contradicting to the contemporaneous documents," the matter was unsuitable for determination by originating summons.

[21] The present case is materially different. The key issue here is not
F about the circumstances of obtaining the policy or any disputed transfer of interest. Rather, it turns on two straightforward questions:

(i) when was the policy issued? This is conclusively answered by the Certificate of Takaful showing 3.49pm on 23 December 2022; and

G (ii) when did the accident occur? Even taking the third defendant's own version in his police report that it happened at 3.45pm, this precedes the policy issuance.

[22] Unlike *Balamoney* and *Aqmal Dakhirrudin* where oral evidence was needed to resolve factual controversies about the parties' conduct, here we
H have contemporaneous documentary evidence establishing the critical timeline. The first and second defendants' testimony cannot alter these objective facts about timing.

[23] Moreover, while in *Balamoney* the policy's validity turned on the insurer's own conduct in renewing it after the insured's death, here the
I simple chronological sequence shows the policy was purchased after the accident occurred. This is not a matter requiring extensive factual inquiry – it is apparent from the documents themselves.

[24] Therefore, while I fully accept the principles in *Balamoney* and *Aqmal Dakhirrudin* that disputed facts generally require oral evidence, I find this case exceptional. The documentary evidence conclusively establishes the sequence of events, making this suitable for determination by originating summons. To require a full trial would be an unnecessary formality where the essential facts are already irrefutably proven by contemporaneous records.

Whether The Insurance Policy Was In Effect At The Time Of The Accident

[25] The central issue before this court is whether Policy No. 85606544 issued by Etiqa was in force at the time of the accident on 23 December 2022. While it is undisputed that both events occurred on the same day, there is significant controversy over the precise time at which the policy came into effect.

[26] The starting point of analysis must be the Federal Court's authoritative pronouncement in *Pacific & Orient Insurance Co Bhd v. Hameed Jagubar Syed Ahmad* [2018] 9 CLJ 691; [2018] 12 MLJ 1. In that landmark decision, the Federal Court considered nearly identical circumstances where an accident and policy issuance occurred on the same day but at different times. The Federal Court's analysis provides the governing principles for resolving such disputes.

[27] First, the Federal Court established that where both date and time of issuance are specified in the insurance documentation, this constitutes what the court termed a "special contract". As Aziah Ali FCJ explained at para. 40:

> Adopting the approach taken by the Supreme Court of India, we find that the policy under consideration in this appeal where the date and time of issue are mentioned in the cover note is a 'special contract'.

[28] This classification as a "special contract" is legally significant because it determines how policy commencement is to be interpreted. The Federal Court held unequivocally at para. 41:

> Our answer to the first question is that an insurance policy will take effect from the time of issuance of cover.

[29] Mr Ganesh, appearing for the third defendant, contended that since neither the Certificate of Takaful nor the Schedule explicitly states a commencement time, the policy should be deemed to take effect from midnight of 23 December 2022 by default. He relied primarily on the Court of Appeal's decision in *Hameed Jagubar Syed Ahmad v. Pacific & Orient Insurance Co Bhd* [2017] 10 CLJ 278.

[30] However, this argument faces two insurmountable difficulties. First, the Court of Appeal decision relied upon was explicitly overturned by the Federal Court in *Pacific & Orient Insurance*. The Federal Court rejected the very midnight default rule that Mr Ganesh seeks to invoke.

[31] Second, and more fundamentally, the premise of Mr Ganesh's argument – that no specific time is stated – is incorrect when the insurance documentation is read as a whole. The Certificate of Takaful clearly records issuance at 3.49pm on 23 December 2022. Following *Pacific & Orient Insurance*, this specification of both date and time creates a "special contract" where coverage commences at the stated time of issuance.

[32] This interpretation is reinforced by the Federal Court's emphasis in *Pacific & Orient Insurance* on the integral connection between premium payment and risk assumption. As Aziah Ali FCJ observed at para. 29:

> Insurance is a contract based upon speculation ... Like any contract, an insurance contract requires the elements of offer, acceptance and consideration... Under the contract, the insurer assumes his obligation to the insured in return for a money consideration, called the premium.

[33] The Federal Court further noted at para. 31 that "The cover note is in itself a contract of insurance, governing the rights and liabilities of the parties in the event of a loss taking place during its currency."

[34] The Federal Court's approach has been consistently applied by the High Courts. In *Allianz General Insurance Company (M) Bhd v. Malim Shahrizal Abdul Wahab & Anor* [2021] CLJU 1544; [2021] 1 LNS 1544; [2021] MLJU 1919, *Liberty Insurance Bhd v. Muhammad Qairul Jafnie Abdul Rani & Anor* [2024] CLJU 453; [2024] 1 LNS 453; [2024] MLJU 482, and several other decisions, the courts have upheld the stated issuance time as determinative of when coverage begins, even where that time appears only in the certificate/cover note and not in the policy schedule.

[35] In this case, the evidence establishes that:

(i) the Certificate of Takaful specifies issuance at 3.49pm on 23 December 2022;

(ii) photos submitted by the second defendant were timestamped at 2.45pm;

(iii) the third defendant's own police report states the accident occurred around 3.45pm; and

(iv) the second defendant initially reported the accident time as 3.45pm before amending it to 2.47pm.

[36] Following the Federal Court decision in *Pacific & Orient Insurance*, the specification of both date and time (3.49pm on 23 December 2022) in the certificate creates a "special contract" where coverage commenced at that precise time. Since all available evidence places the accident before 3.49pm, it necessarily occurred outside the period of coverage.

[37] This conclusion aligns with both legal principle and commercial reality. As the Federal Court emphasised in *Pacific & Orient Insurance* at para. 29, insurance is fundamentally a contract of speculation regarding

future uncertainties. It would be commercially nonsensical, and legally problematic, to interpret an insurance contract as covering an accident that had already occurred before the contract's formation.

[38] The evidence of photography timestamps and police reports showing the accident's earlier occurrence serves to reinforce this legal analysis, though it is not strictly necessary to the outcome. The specification of 3.49pm as the issuance time is itself sufficient under *Pacific & Orient Insurance* to establish that as the commencement of coverage.

[39] Based on the Federal Court's binding authority in *Pacific & Orient Insurance* and the clear evidence before this court, I find that Policy No. 85606544 took effect at 3.49pm on 23 December 2022, after the accident had already occurred.

Whether Etiqa (Insurer) Has Waived Its Right To Void The Policy

[40] Mr Ganesh argued that pursuant to Schedule 9 of the FSA, Etiqa had a duty to inquire with the first defendant about any accidents that had occurred on the inception date of the policy, *ie*, 23 December 2022. The relevant provisions of Schedule 9 state:

> 5(1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.
>
> 5(5) If the licensed insurer does not make a request in accordance with subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.

[41] Based on these provisions, Mr Ganesh submitted that by failing to pose specific questions about accidents on the inception date, Etiqa is deemed to have waived its right to complain about non-disclosure by the first defendant.

[42] Mr Ganesh further relied on sub-para. 5(9) of Schedule 9 which provides:

> Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[43] He submitted that this provision has modified the traditional common law duty of utmost good faith, which is no longer solely imposed on the insured. Instead, the insurer is also obligated to take proactive steps to obtain all material information before underwriting the risk. Failure to do so would prevent the insurer from seeking a declaration to void the policy under s. 96(3) of the RTA 1987. Section 96(3) reads:

A (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

[44] In response, Mr Denis contended that there is nothing in the pleaded case to show that Etiqa was aware of a potential accident and neglected to B investigate further. The duty to disclose still lay with the first defendant, who should have informed Etiqa of the accident before procuring the policy on the same day. Without such disclosure, Etiqa should not be faulted for issuing the policy in ignorance of the accident.

[45] Mr Denis relied on the case of *Pacific & Orient Insurance Co Bhd* C *v. Hameed Jagubar bin Syed Ahmad* where the Federal Court held at [35]:

> The duty of disclosure is provided under s. 150(1) of Act 553 which states as follows:
>
> 150(1) Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that: D
>
> (a) he knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied; or
>
> (b) a reasonable person in the circumstances could be expected to know to be relevant. E

[46] I have considered the relevant provisions in the FSA and find that they do not go so far as to impose a strict liability on the insurer for failing to ask specific questions. While Schedule 9 does spell out situations where the insured's duty of disclosure may be waived under paras. 5(5) and 5(6), these F provisions must be read purposively and in context.

[47] There is no evidence that Etiqa was put on inquiry that an accident had already occurred earlier that day. Without any basis for suspicion, I agree with Mr Denis that it would be unreasonable to expect Etiqa to routinely ask each and every proposer about same-day accidents before G issuing a policy. Etiqa was entitled to rely on the first defendant's implied representation that the vehicle was not tainted by any prior mishaps.

[48] This interpretation is supported by the Court of Appeal's decision in *Balamoney Asoriah* which held at [35] that "The new statutory regime recognises in sub-para. 5(9) the mutual duty of utmost good faith or *uberrimae* H *fidei* that was owed at all times by both parties to the insurance contract." The key word is 'mutual' – both parties must act in good faith. It would be contrary to this principle and also public policy and common sense to allow an insured to suppress material facts and profit from such non-disclosure, in the hope that the insurer's lack of clairvoyance or targeted probing would be I construed as a waiver. The reciprocal duty of utmost good faith and the spirit of the FSA militate against such an interpretation.

[49] Further support can be found in *Mohd Faiz Zulkifli (A Minor Suing Through His Father And Next Of Kin; Zulkifli Awang Kechik) & Anor v. Etiqa Takaful Bhd* [2016] 5 CLJ 679 where the High Court held that the non-disclosure of a prior accident would amount to fraud sufficient to void the policy, if the insured person failed to disclose the true facts when specifically asked. However, the court also recognised that if the insurer's agent had not made any inquiry despite the opportunity to do so, this omission would constitute a waiver of the right to information.

[50] Having regard to all the authorities, I find that the present case is distinguishable. Here, there was no reasonable opportunity for Etiqa to discover the accident through routine inquiry. The first defendant's failure to disclose such a material fact strikes at the root of the insurance contract and cannot be excused by the insurer's failure to specifically ask about it.

[51] As such, I hold that Etiqa has not waived its entitlement to avoid the policy for pre-contractual non-disclosure, and its omission to ask about a pre-existing accident does not preclude the present application to void the policy under s. 96(3) of the RTA 1987.

Whether Granting The Declaration Would Be Contrary To The Intention Of The RTA 1987

[52] Mr Ganesh urged the court to adopt a purposive interpretation of the RTA 1987 to prioritise the protection of innocent third parties like the third defendant. He submitted that allowing Etiqa to void its liability in these circumstances would undermine the compensatory purpose of the legislative scheme and lead to unfair prejudice against the injured third party.

[53] However, I am of the view that the interest of third parties cannot override the clear language and effect of the contract between Etiqa and the first defendant. While the RTA 1987 does have a salutary aim of facilitating the recovery of accident claims, it does not compel an insurer to underwrite a risk that it did not agree to bear.

[54] It is significant that Etiqa is seeking this declaration under s. 96(3) of the RTA 1987, which specifically empowers an insurer to obtain such court order to invalidate a policy, before any judgment on liability has been entered. The existence of this provision demonstrates that Parliament did envision situations where an insurer's contractual rights would take precedence over a third-party claimant.

[55] In any event, voiding this policy would not leave the third defendant without any remedy, as he would still have an avenue to pursue his claim directly against the first and/or second defendant as the culpable tortfeasor(s). The third defendant's rights against Etiqa cannot rise higher than that of the first defendant as Etiqa's contractual counterparty. Since the policy itself is void due to the first defendant's non-disclosure, the third defendant also cannot claim the benefit of that vitiated policy.

[56] Therefore, I find that granting Etiqa's present application would not run counter to the underlying objectives of the RTA 1987.

Whether Etiqa's Own Omissions Or Carelessness Should Prevent It From Obtaining The Declaration

[57] Mr Ganesh argued that Etiqa had not exercised due diligence when underwriting the policy, and should bear the consequences of its failure to elicit the necessary information about the prior accident.

[58] However, as explained above, I do not think Etiqa was under any obligation to play detective and press the first defendant for details of an accident it was unaware of. There is nothing to suggest that Etiqa was careless in processing this policy. The law does not require an insurer to be a mind-reader and expect the worst from each proposer.

[59] The first defendant as the party seeking coverage had the responsibility of making a clean breast of all material facts within his knowledge. He cannot now blame Etiqa for taking him at his word and issuing the policy without deeper investigations.

[60] Accordingly, I am satisfied that there was no remissness or lack of due care on Etiqa's part that would disentitle it from the declaratory relief.

Whether S. 96(3) Of The RTA 1987 Should Be Interpreted To Allow Etiqa's Application In These Circumstances

[61] Finally, I must address the applicability of s. 96(3) of the RTA 1987 to the present case.

[62] Mr Denis highlighted that Etiqa's application was filed before any judgment has been entered on the third defendant's claim. The timing is significant because s. 96(3) explicitly states that "No sum shall be payable by an insurer under sub-s. (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable."

[63] This interpretation of the statutory timeline is well-supported by case law, particularly *Kurnia Insurans (Malaysia) Bhd v. Personal Representatives Of Zenol Saad & Ors* [2013] CLJU 239; [2013] 1 LNS 239. In that case, Justice Yeoh Wee Siam addressed a similar scenario where the insurer sought declarations under s. 96(3) while proceedings were pending in the Sessions Court. Her Ladyship observed that the purpose of s. 96(3) was to allow insurers to obtain declaratory relief before any decision on liability is made in the main action. As she noted:

> The Sessions Court case has not been heard or decided yet. The Applicant is endeavouring to obtain the declaratory reliefs sought in this Application before the decision of the Sessions Court is given on the liability of R2, if any, to R3 and R4. It is clear that the Applicant is avoiding any liability of R2 to R3 and R4 which may be enforceable by R3 and R4, as third party, against the insurer under s. 96(1) of the RTA.

[64] The reasoning in *Kurnia* demonstrates that s. 96(3) serves as a crucial mechanism for insurers to challenge policy validity before they become statutorily bound to satisfy any judgment under s. 96(1). Section 96(1) imposes a broad obligation on insurers to honour judgments against their insured parties "notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy." However, s. 96(3) carves out an important exception – allowing insurers to obtain declarations voiding policies before judgment is entered, thereby pre-empting the s. 96(1) obligation.

[65] The High Court in *Kurnia* proceeded to grant the declarations sought despite the pending Sessions Court trial, recognising that s. 96(3) applications need not await the outcome of the main liability proceedings. This precedent directly supports Etiqa's right to bring the present application at this juncture.

[66] Moreover, I note that this interpretation aligns with the statutory scheme's balance between protecting third-party claimants and preserving insurers' rights to challenge policy validity on legitimate grounds. While s. 96(1) ensures claimants can recover from insurers once judgment is obtained, s. 96(3) provides insurers a window to contest clearly void policies before that liability crystallises.

[67] Therefore, as a matter of statutory construction reinforced by binding precedent, I am satisfied that s. 96(3) permits Etiqa to seek these declarations at this stage, prior to any judgment being entered in the Sessions Court proceedings. The potential impact on the injured claimant's prospects of recovery, while unfortunate, cannot override the clear statutory right granted to insurers under s. 96(3) when properly invoked within the prescribed timeframe.

Conclusion

[68] For all the foregoing reasons, I allow Etiqa's application in full and grant the following orders:

(i) Insurance Policy No. 85606544 covering motor vehicle No. WXE 6746 for the period 23 December 2022 to 22 December 2023 is void and unenforceable in respect of the road accident that occurred on 23 December 2022 involving motor vehicle No. WXE 6746 and motorcycle No. BQU 1570;

(ii) consequently, the applicant (Etiqa) shall not be liable for any claims arising from the accident between motor vehicle No. WXE 6746 and motorcycle No. BQU 1570; and

(iii) the third respondent shall pay costs of RM2,000 to the applicant.